No 17.

eases given to her, she being in the creditor's place; and, as Sir James Elphingston could not have compelled them to quit any part of their just debt, so neither can their favour be wrested from her: And though the office of executry be but a trust, yet it was never pleaded to that pitch, to deprive them of the eases given them on personal considerations. It is true, what tutors or curators get down of their pupil's debts, accresces to the minors, and so in factors and chamberlains; but no lawyer has yet extended it to executors. THE LORDS, by plurality, found they could not engross the benefit of the eases to themselves farther than they were either creditors by bonds, or by the legal proportion allotted them, and so could not exhaust the testament by the eases, to the prejudice of the other co-creditors; but though they found this in the general, yet reserved the consideration of the specialities which might be in this case till the advising of the cause; such as a personal regard to her circumstances, which they would not have yielded to the other creditors who needed not that favour; and, if they had dreamed of its running any other way, they would have exacted their whole sums. A commission being craved for her deponing in the North, it was *objected*, That the eases would be so cunningly and latently managed, there was a necessity of her deponing before the Lords, to disclose these private negotiations, which will give rise to such incident interrogatories as can neither be seen before or prophesied, so as to be insert in a commission, where things would be huddled up in darkness. THE LORDS refused to grant her a commission in this case; but reserved the specialities on which the eases were given, to be considered after her deponing. This was looked upon as a great decision, and a leading case against heirs entering *cum beneficio inventarii*, that they must not exhaust the heritage by counting up the eases they have got. It lays also donatars of escheat open the same way to the creditors ranked in their back-bonds.

Fountainhall, v. 2. p. 610.

1721. *December.*

SIR JAMES KINLOCH of that Ilk, *against* BLAIR of Ardblair, Merchant in Edinburgh.

No 18.

An executor is but a trustee, and cannot gratuitously discharge debts owing to the defunct.

SIR JAMES being creditor by progress to the deceased Mr Gilbert Blair of Balgersho, obtained from his executor an assignation to certain debts due to the defunct, and given up in the inventory of his confirmed testament; and amongst others, a bond of 300 merks due to the said Mr Gilbert by the said James Blair: Upon this assignation, James Blair being charged, he obtained suspension upon a gratuitous discharge granted by the said Mr Gilbert Blair's executor, of a date anterior to the assignation.

The question arose, If a gratuitous discharge by an executor to the debtor of the defunct, does exclude the defunct's true and lawful creditors? And it was

contended for the pursuer, that it does not; because, 1*mo*, The defunct him- No 18.
could not have gratuitously disponed or discharged in prejudice of his creditors; far less his executor who is now bankrupt. 2*do*, An executor is only trustee for the creditors of the defunct, and has by no means the absolute disposal of the subjects confirmed.

To the *first*, *answered*, The executor was solvent at the time of granting the discharge; and it is a rule, that gratuitous deeds are only reducible upon the act 1621, where the granter does thereby become insolvent; so that as the defunct himself could have granted this discharge notwithstanding his former debts, so may his executor; and if the executor became thereafter insolvent, *sibi imputet*; who did not insist in time against the executor to obtain payment.

To the *second*, *answered*, The executor is not in any proper sense a *trustee*, but a *successor*; he is indeed accountable to the creditors as far as to the value of the testament, but they have no *real* interest in the defunct's goods; otherwise they might recover them *rei vindicatione*, or *condictione*, against his debtors; which will not be pretended: All they have, is a personal action against the executor to account *secundum vires inventarii*; so that though the executor do gift or dilapidate the inventory, the acquirers are secure, providing he becomes not thereby bankrupt; and the only redress of the creditors is by their personal action against the executor.

Replied to this *last*, An executor is truly a *trustee*, which the very name denotes, importing an *office*, not a *succession*; he indeed has the only power to intromit with the defunct's moveables, and pursue *rei vindicatione*, or *condictione* against his debtors; but is not this perfectly consistent with his being a trustee? is it not the very design of the thing, that he alone should intromit for the common benefit of all concerned?

'THE LORDS refused to sustain the gratuitous discharge.'

Fol. Dic. v. 1. *p.* 273. *Rem. Dec. v.* 1. *No* 28. *p.* 60.

1738. *June* 15.

LEGATARS of MRS HANNAH *against* HENRY GUTHRIE Writer in Edinburgh.

No 19.
An executor-nominate is liable to account for the residue of the free effects to legatars, if it appear, by his oath, the testator trusted to his faith to dispose of it in that manner.

MRS HANNAH executed a testament, wherein she appointed Mr Guthrie her executor, and burdened him with certain legacies to her relations; signifying to him, at the same time, that, whatever residue of her effects should remain over and above her debts and legacies, and a reasonable gratification to himself for his trouble, it was her will or pleasure he should make a fair distribution thereof amongst her friends, in proportion to their legacies expressed in the testament.

Upon her death, the Legatars brought a process against Mr Guthrie for the free balance of the effects, and referred it to his oath, Whether or not the tes-